In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 165

ROLLAND B. MCMASTER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 166

WILLIAM F. WOLFF, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 343 F. 2d 176.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1965. A petition for rehearing was denied on April 21, 1965. The petition for a writ of certiorari in No. 165 was filed on May 20, 1965, and

in No. 166 on May 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

No. 165:

1. Whether, in the circumstances of this case, the court of appeals properly found no prejudicial error in the trial court's failure to caution the jury, at the time evidence of admissions of a co-defendant was introduced, to consider such admissions only against the maker, where such caution was given in the final charge.

No. 166:

2. Whether, after the court had instructed the jury on each of the necessary elements of the offense charged, including payment and delivery of money, the court's reference to the offense of agreement to pay, in the course of reading the statute to the jury, constituted reversible error.

3. Whether, under an indictment charging payments to McMaster, it was a fatal variance to show payments to a corporation of which McMaster was the sole stockholder.

4. Whether the evidence was sufficient to establish the offense charged and the venue.

STATUTE INVOLVED

For the time period covered by these indictments, 29 U.S.C. 186 provided, in pertinent part:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any repre-

sentative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable * * *

(3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business * * *.

STATEMENT

The indictments, each containing 32 counts, were returned in the District Court for the Eastern District of Michigan. Petitioner McMaster, an official of Local 299 of the Teamsters Union, was charged with violating 29 U.S.C. 186(b) by receiving sums of money from Youngstown Cartage Co., an employer of members of Local 299. The sums were alleged to have been received through Ram Transport, Inc., and to have been made between December, 1956, and July, 1959. Petitioner Wolff, president and principal stockholder of Youngstown, was charged with causing Youngstown to make the payments to McMaster (R. I, 5–34). Each defendant was convicted as charged, sentenced to one and one half year's imprisonment (one-year concurrent sentences were imposed on each defendant on 31 counts and a consecutive sentence of one half year on the remaining count), and fined

$10,000 (R. IV, 2075–2078). The convictions were affirmed on appeal.

The evidence showed that Youngstown checks totalling more than $8,000 were made out to Ram Transport Co. and deposited in the Ram bank account in the Detroit Bank and Trust Company in Detroit, Michigan (R. I, 113–116, 118; R. II, 682–684). Petitioner Wolff admitted preparing 23 of the checks (R. I, 119). In an interview with an F.B.I. agent in June, 1961, Wolff said that the payments were for rental of a truck for use in the Youngstown terminal (R. I, 105) pursuant to an oral agreement between Wolff and McMaster who, Wolff said, was president and owner of Ram (R. I, 106). In September, 1961, Wolff said in another interview that the rate of rental was about $3.00 an hour and that the rental was made on the recommendation of Youngstown's terminal manager (R. I, 107–111). In this interview Wolff also said that he had never been involved in any business dealings with McMaster (R. I, 141) and that he had learned from McMaster that the latter did not own Ram (R. I, 167–168).

Much of the government's evidence was designed to show that Youngstown did not in fact use a truck owned by Ram. The sufficiency of that proof is not disputed.[1]

With respect to McMaster's connection with Ram, the government proved that Ram was originally jointly owned by McMaster and Reed (R. I, 83–85).

[1] The evidence is summarized in the argument of government counsel (R. IV, 1865–1878, 1884–1885).

When Reed later wanted to sell his interest, McMaster gave him $500 and had him sell the stock to one Powers for an additional $2,000, to be paid in monthly installments (R. I, 89–90). Reed later sued Powers for nonpayment. In February, 1956, the suit was settled with McMaster paying Reed the $2,000 and Reed indorsing the stock certificate to McMaster (R. I, 90–91, 538–539). In a tax return filed by Ram in August, 1957, McMaster was listed as owner of 100% of the stock (R. I, 418–419). The government showed that in the years 1957–1960 sums of money much greater than the payments from Youngstown to Ram were either credited to McMaster (R. I, 427–428, 532–536) or withdrawn from the Ram account and deposited in the joint account of McMaster and his wife and used for investments by McMaster (R. III, 1234–1241, 1222–1230, 1278–1279, 1281, 1584–1585).

Petitioner McMaster testified that, at about the time of the settlement with Reed, he was separating from his wife and that, since she could work with Powers, he acquired Ram for her (R. III, 1441–1445). Although they were not divorced until 1961, McMaster testified that in 1956 it was decided informally that she was to keep Ram Transport and he was to keep M & G Trucking (R. III, 1448–1449). His wife kept the books for both corporations (R. III, 1449). McMaster explained that the amounts from Ram deposited in the joint checking account and traced to his personal ventures were loans from his wife; he denied receiving the other sums (R. III, 1473–1478, 1482–1485, 1489–

1506). He also testified that, at the time of the 1956 arrangement, his wife said she would pay for a boat for him and she did so through Ram (R. III, 1535–1537). The insurance on the boat was in the name of Ram (R. III, 1553).

ARGUMENT

1. When the statements made by Wolff in June and September, 1961 (the first stating that he made the payments pursuant to a lease negotiated with McMaster; the second denying that he had any business dealings with McMaster) were introduced in evidence, the court was not asked to give and did not give any instruction limiting the applicability of this evidence to Wolff. In his motions for judgment of acquittal McMaster's counsel argued that such testimony was not admissible against McMaster (R. III, 1328–1333; R. IV, 1794), although he again did not ask for a limiting instruction. The trial court stated in its instructions to the jury that declarations and admissions of a defendant from which an inference of guilt may be drawn "are admissible against him, and him only, as admissions" (R. IV, 2030). The court of appeals ruled that such a cautionary instruction should normally be given when the statement is introduced, and that delay in the giving of an admonition can be prejudicial. The court of appeals held, however, that in view of the overwhelming evidence of guilt here the error in not giving the instruction earlier could properly be deemed harmless (Pet. No. 165, App. 21–23).

It is this ruling which McMaster (Pet. No. 165) seeks to have this Court review.[2]

The ruling of the court of appeals was correct. The statement by Wolff was not, as McMaster claims, the most damaging and direct evidence against him. The significant evidence, laboriously proved in a long trial, was that Youngstown made payments for a truck which did not exist to a corporation which was an alter ego of petitioner. There was no reason for the payments to be made except as payments to petitioner by virtue of his position. Without Wolff's statements, there was ample evidence to support the conclusion of the jury (which was eventually instructed not to consider Wolff's admissions in McMaster's case), that Youngstown made the payments to Ram as a means of making payments to petitioner, and that McMaster used Ram as a means of receiving such payments.

2. In its instructions, the trial court set forth the elements of the offense charged against each defendant. As to Wolff, these instructions included the direction that the jury must find that Wolff "paid and/or delivered money, and caused Youngstown

[2] The suggestion in McMaster's petition that the case should be returned to the court of appeals for more extensive treatment of other issues raised before the court of appeals is frivolous. The court of appeals dealt with the validity of the indictment and the sufficiency of the evidence, both as to the substantive offense and as to venue. It found the issue discussed in the text to be the "only substantial claim of error" (Pet. No. 165, App. 18). Petitioner does not endeavor to show in what respect the other issues raised were worthy of greater comment.

Cartage to pay and deliver money to defendant McMaster as a representative of any employees of Youngstown Cartage" (R. IV, 2025). However, when it subsequently read the statute to the jury (R. IV, 2026), the court included statutory language making it an offense "to agree to pay or deliver" any money to the representative of employees. Petitioner Wolff argues (Pet. No. 166, pp. 8–11) that this recitation of the statutory language, in light of evidence of letters referring to a verbal agreement for the lease of a truck (see R. I, 140, 164), enabled the jury to convict him of the offense of agreement, which was not charged, rather than of actual payment. This argument is insubstantial. There was never any dispute about the fact that payments were actually made to Ram. The jury had to decide whether these payments were payments to McMaster and whether they were for a proper purpose under the statute, *i.e.*, for the lease of equipment. There was thus no possibility that the mere reading of the statute, in the light of the prior specific enumeration of the elements of the offense charged against Wolff, would lead the jury to convict of an offense not charged.

3. Wolff's challenge to the sufficiency of the indictment on the ground that it charged payment to McMaster, without specifying that the payments were to McMaster through Ram (Pet. No. 165, pp. 12–16) is without merit. It was proper to charge payment to McMaster since such payment was an element of the offense. In light of the evidence in this case, Wolff could have been in no doubt regarding what payments were thus referred to in the indictment.

4. The attack upon the sufficiency of the evidence (Pet. No. 166, pp. 16–17) is answered by the opinion of the court of appeals. The finding that Wolff knew that the payments were being made to McMaster did not rest solely on his admissions, but upon the totality of the evidence. Moreover, Wolff's admission that he dealt with McMaster in making the "lease" that was the alleged basis of the payments was specifically corroborated by evidence showing McMaster to be the sole stockholder of Ram. As for venue, it was not disputed that the money represented by Youngstown's checks was paid into Ram's bank account in Detroit. Thus the money was "delivered" in the Eastern District of Michigan where the trial was held.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

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